No. 15244

United States Court of Appeals

For the Ninth Circuit

JOHNSON LINE, a Corporation, *Appellant,*

vs.

SHAUN MALONEY, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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THE ARGUS PRESS, SEATTLE

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United States Court of Appeals
For the Ninth Circuit

JOHNSON LINE, a Corporation, *Appellant,* vs. SHAUN MALONEY, *Appellee.*		No. 15244

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Northern Division, awarding to appellee herein the sum of $22,300.00 and costs for injuries received by him in a fall on June 28, 1953, when he was engaged in the course of his employment as a longshoreman aboard the SS GOLDEN GATE, a merchant vessel owned and operated by the appellant.

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

The jurisdiction of this Court is conferred by the provisions of Title 28, U.S.C.A. §1291 which gives to the Courts of Appeal jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

On June 28, 1953, the appellant's vessel SS Golden Gate was engaged in cargo operations at a dock in the Port of Seattle, Washington. Aboard the vessel and preparing to work the cargo was a gang of longshoremen among whom was the appellee, Shaun Maloney. Since the vessel had just prior thereto arrived from the Port of Tacoma, Washington, it was necessary that the men first remove the tarpaulins and hatchboards from the various holds preliminary to their actual handling of the cargo. The appellee and members of his particular gang were assigned to hatch No. 7 which was the after hatch on the vessel. Upon arriving at this hatch it was found that it was completely closed or "battened down" in condition for sea. Prior to this time there had been no longshoremen aboard the vessel in the Port of Seattle.

After the tarpaulins and hatchcovers had been removed the appellee started down a ladder to the tween deck area (Tr. 61). When the appellee reached this area he stepped off the ladder, took a step or two and then slipped and fell (Tr. 61). He testified that the tween deck had a heavy covering of wheat dust and wheat kernels which resulted in a slippery condition (Tr. 62). This condition was not visible from the weather or upper deck of the vessel prior to his starting down the ladder (Tr. 62).

The witness William Dibble, who as supercargo supervised the loading and discharging of the vessel both at Seattle and Tacoma, stated on direct examination that as a part of their work the longshoremen cleaned up the deck of loose wheat at Tacoma prior to the ves-

sel's going to Seattle (Tr. 91). This loose wheat had resulted from the wheat cargo being loaded at Tacoma (Tr. 90).

The appellee completed his work on the vessel (Tr. 82) and then reported to Dr. Smith who diagnosed a wrist sprain and commenced physiotherapy treatments (Tr. 82). He called upon Dr. Bernard Gray on December 28, 1953, who recommended that he wear a leather cuff (Tr. 68). He received no further treatment.

The appellee testified that it was necessary for him on occasions to lay off work briefly because of swelling of his arm (Tr. 73). As of the date of the trial (August 3, 1955) he computed that he had lost 184 days or approximately $2,300.00 as a result of the disability of his hand and wrist (Tr. 74). His average monthly earnings during 1955 up to the date of trial, however, were greater than any past earnings in evidence either before or after the injury (Tr. 86).

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court committed reversible error in refusing to apply the rule of transitory unseaworthiness under the facts of the case.

2. Whether the trial court committed reversible error in awarding excessive damages unsupported by the evidence.

SPECIFICATIONS OF ERRORS

The court erred in its entry of Findings of Fact, Conclusions of Law, Final Decree and Judgment awarding appellee a judgment against the appellant in the sum of $22,300.00 together with costs and interest.

ARGUMENT

A. The Doctrine of Transitory Unseaworthiness

The doctrine of transitory unseaworthiness, sometimes referred to as the Cookingham doctrine, states that a defendant vessel operator is not to be held liable for injuries resulting from unsafe conditions on his vessel unless he has had a reasonable opportunity to discover and correct the hazards. This doctrine excludes defective appliances and defective structural conditions aboard a vessel but applies to "transitory conditions" such as oil, grease, and other foreign substances which render the particular area in question an unsafe place to work.

Prior to the consideration of this doctrine with reference to the facts of the case at bar it is necessary to refer to all of the testimony which can be said to have a bearing on the application or non-application of this rule.

The defendant's witness William Dibble was supercargo aboard the vessel at Tacoma where the wheat was loaded prior to the time the vessel came to Seattle. He testified that it was standard practice that the vessel was cleaned in Tacoma following the loading (Tr. 92).

Concerning the arrival of the vessel at Seattle and her condition, the appellee testified:

> "Q. If you know, when had the ship come in?
>
> A. Sometime during the night.
>
> Q. If you know, had there been any longshoremen aboard the ship after she came in prior to the time you came aboard?
>
> A. No, there was no one aboard, other than the crew.

Q. Do you know where she had come from?

A. She had come from sea. I don't know what port.

* * * * * * * *

Q. What was the condition of that hatch at the weather deck level as you went down there?

A. As I recall there was the small punt or raft that the sailors paint with, a couple of other boxes on the deck, and that is all that was on the deck to my knowledge that I recall. The hatch was covered.

Q. How was it covered?

A. As is the usual manner, with pontoons or hatch covers and tarpaulins over them.

Q. As you saw the hatch was it in condition for sea?

A. Yes, it was." (Tr. 59-60.

The appellee's witness Oscar Hurst, a fellow longshoreman, testified as follows on the condition of the hatch at the time the men commenced work:

"Q. Was that 8 o'clock in the morning?

A. 8 o'clock in the morning.

* * * * * * * *

Q. And what, if anything, did you do when you went to that hatch at the after end of the ship?

A. Well, the first thing we did was to—is to take off the tarpaulins and then take off the hatches and then descend below to work the cargo.

* * * * * * * *

Q. Do you know who the first man down the ladder was?

A. Yes, I do remember.

Q. Who was that?

A. That was Maloney." (Tr. 50)

The appellee also described what was done after the hatch was opened:

> "Q. After you removed the tarpaulins and the hatch covers as you have related, what next did you do?
>
> A. I started down the ladder.
>
> * * * * * * * *
>
> Q. Did anybody proceed you down that ladder?
>
> A. No, sir, I was the first man down." (Tr. 61)

From the foregoing testimony it is evident that the vessel loaded grain in Tacoma, Washington, and then traveled to Seattle through the night with the hatch completely covered.

As a probable explanation of how the wheat kernels and wheat dust, if any, came to be on the deck in the area of appellee's fall, the appellee testified as follows:

> "I didn't look into the feeder box, but I would assume there was grain in there because when you pour wheat into a ship or any bulk grain cargo they have a certain amount of it that you can see. There is evidence of it. They shoot it in and some of it slips out through cracks and spills and things like that." (Tr. 81)

The witness Dibble confirmed the appellee's testimony in this regard:

> "A. Well, there is always a certain amount that spills over, of course, when they are pouring the wheat. They clean up the decks as best they can and all of the wheat is put into the hold where it is supposed to be. Occasionally there is a little wheat slops over, gets on the decks." (Tr. 90)

The doctrine of transitory unseaworthiness is first to be found in the frequently cited case of *Cookingham*

v. United States (3rd Cir. 1950) 184 F.(2d) 213, cert. den. 340 U.S. 586, 95 L.ed. 675. The court there held that there is no liability on the part of a shipowner following an injury caused by a transitory unsafe condition of which the vessel and its officers had no notice. The court considered both negligence and unseaworthiness as applied to a situation where a crew member had slipped on jello which had been dropped on a vessel's stairway. The court held:

> "There being no evidence as to how long a time the jello had been on the step prior to the accident, a finding that the ship's officers were negligent in failing to remove it after they knew, or should have known of its existence, would, we think, not have been warranted."

As to seaworthiness, the court stated:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us."

The approval and application of this doctrine in a maritime injury case occurring under circumstances similar to the case at bar is to be found in the trial and appellate court reports of *Pope & Talbot v. Hawn,* 346 U.S. 406, 98 L.ed. 143, 74 S.Ct. 202. The workman in that case was injured as a result of a fall from the tween deck to the lower hold of the vessel while it was tied up in port. This case was tried to the jury in the District Court of the Eastern District of Pennsylvania. The decision of the court on the defendant's motion for

judgment *n.o.v.* is to be found at *Hawn v. Pope & Talbot, Inc.,* 99 F.Supp. 226. At page 229 of the decision District Judge McGranery states as follows:

> "Whether there was any evidence of unseaworthiness, however, is a close question. The evidence reveals three possible grounds for a finding of unseaworthiness: (1) the slippery condition of the deck and hatch covers because of the presence of grain dust deposited by a partial grainloading; (2) inadequate lighting in the 'tween deck section of the hold where the accident occurred; and, (3) the absence, for some time prior to the accident, of a hatch cover at the point where the plaintiff fell, the evidence being that on the preceding day, ship cleaners had noticed missing hatch covers in the vicinity. Under the recent Third Circuit decision of *Cookingham v. U. S.,* 184 F.(2d) 213, noted 19 Geo. Wash. L. Rev. 341, the first two conditions may not be described as conditions of unseaworthiness. *The slipperiness of the decks because of grain dust from a loading was merely a transitory unsafe condition resulting from the normal use and operation of the ship, involving no inherently defective appliance.* The same may be said of the lighting conditions. It is difficult to determine whether the absence of a hatch cover for a period of a day prior to the accident is merely a transitory condition, without evidence of how long the condition actually existed. *Cf.* Judge Biggs' dissent in the *Cookingham* case. In the instant case, the court concludes that the evidence would warrant a finding of unseaworthiness." (Emphasis supplied)

While the circuit court on appeal found that the slippery condition, combined particularly with the absence of the hatch covers, could have presented a situation

from which negligence could be inferred, it stated (*Hawn v. Pope & Talbot, Inc.*, 198 F.(2d) 800):

> "On the merits of this point appellant argues that there was no evidence of unseaworthiness. The contention is not borne out by the record. The absence of the hatch covers in the 'tween deck where Hawn was supervising his workmen and with the facts justifying an inference of the existence of that situation for such a period as to remove it from the type of transitory conditions exemplified in *Cookingham v. United States* (3 Cir.) 184 F.(2d) 213, certiorari denied 340 U.S. 935, 71 S.Ct. 495, 95 L.ed. 675, was sufficient to allow submission of that question to the jury. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.ed. 561."

It will be noted from the foregoing that the circuit court accepted the doctrine of *Cookingham* but stated that the facts of the condition of the hatch covers did not justify the application of that doctrine to the hatch covers. Inferentially the court was indicating that the presence of the grain dust did properly come within the *Cookingham* doctrine and therefore was a type of transitory condition.

The appeal of this case to the United States Supreme Court involved other points not pertinent here.

In *Daniels v. Pacific-Atlantic Steamship Company* (1954-E.D.N.Y.) 120 F.Supp. 96, the court considered the question of whether the mere presence of a spot of oil or grease constituted unseaworthiness as a matter of law and rejected the contention. The court stated (p. 99):

> "*The mere presence of grease or oil or other transitory substance on a deck of a vessel, causing*

one to slip and sustain injuries has been held not to constitute unseaworthiness. The ship owner is not an insurer of safety. Hanrahan v. Pacific Transport Co., 2 Cir. 1919, 202 F. 951, certiorari denied 252 U.S. 579, 40 S.Ct. 345, 64 L.ed. 726; *The Seeandbee, supra; Adamowski v. Gulf Oil Corporation, supra; Cookingham v. United States* (3 Cir., 1950) 184 F.(2d) 213; *Holliday v. Pacific Atlantic S.S. Co., supra; Shannon v. Union Barge Line Corp., supra,* and *Hawn v. Pope & Talbot, Inc., supra.* In the *Hanrahan v. Pacific Transport Company* case, the court determined that the temporary absence of a handrail did not warrant a finding of unseaworthiness. *As heretofore stated, it was held in The Seeandbee case that the presence of grease and oil on the deck did not render the vessel unseaworthy.* In the *Adamowski* case (93 F. Supp. 117), the plaintiff claimed he slipped while going through a dark passageway, where later an oil spot was discovered. The court said, ' * * * The defendant cannot be held liable for unseaworthiness * * *. The passageway in which the plaintiff slipped was perfectly sound.' In the *Cookingham* case, it was held that a transitory unsafe substance on a stairway, such as jello, was not unseaworthiness. In the *Holliday* case, the court followed the *Cookingham* case and held that wires protruding from a package or box in an ice-box, did not amount to unseaworthiness. In the *Shannon* case, the claimant slipped on an oil spot on the deck and fell against a metallic bar, running diagonally across a doorway. The bar was in good repair. It was held that no unseaworthiness existed. In the *Hawn v. Pope & Talbot* case, the court followed the *Cookingham* case and stated that a deck made slippery because of grain dust from loading was a transitory

> unsafe condition, resulting from the normal use and operation of the ship, involving no inherently defective condition and hence not unseaworthy."

The basis of the *Cookingham* doctrine is notice. The courts have refused to hold a shipowner liable for a transitory unsafe condition unless it can be shown that the shipowner had actual or constructive notice. As stated in *Gladstone v. Matson Navigation Co.* (Cal.) 269 P.(2d) 39:

> "While generally there is an absolute liability on a shipowner regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness, and no fault or failure of appliance or equipment, the shipowner's liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness."

In *Guerrini v. United States* (2 Cir. 1948) 167 F.(2d) 352, the court was considering a slippery condition resulting from a patch of grease. The court stated (p. 356):

> "In the case at bar the findings are not sufficient finally to dispose of the case; for, although the judge found the respondent negligent, that is not a finding of fact. True, he found that the libelant had slipped upon a patch of grease, but he did not find how long it had been on the deck; and the cause must go back for a specific finding on that issue, because the respondent's negligence depends upon how long the grease had been on the deck. Unless the libelant satisfies the judge that a patch of the size described had been left in the place de-

> scribed for a period long enough to be noticed by the officer on watch, the libel must be dismissed."

In *Poignant v. United States* (2 Cir. 1955), 225 F.(2d) 595, the Second Circuit considered the question of transitory unseaworthiness with respect to the presence of an apple skin on the passageway of the vessel which caused the libelant to slip, fall and sustain an injury. The court first referred to the *Cookingham* and subsequent cases, *supra,* commenting that it had been held in those cases that there was no breach of warranty of seaworthiness under such conditions involving transitory substances. The court was cognizant of the rule of *Alaska Steamship Company v. Petterson,* 347 U.S. 396, 74 S.C. 601, 98 L.ed. 798, but in referring to it stated as follows (p. 598):

> "Nevertheless, that opinion (*Petterson*) does not go so far as to hold that unseaworthiness arises from every defect in a vessel or in its equipment or maintenance, whether consisting of a transitory substance or otherwise."

The court then referred to *Boudoin v. Lykes Bros. SS Co.,* 348 U.S. 336, 75 S.Ct. 382, 384, stating that this subsequent decision makes it abundantly clear that the United States Supreme Court did not overrule the long-settled doctrine that to be seaworthy a vessel does not need to be free from all cause of mishap — that it is enough if it is "reasonably fit." The Second Circuit then stated (p. 598):

> "We think the import of the *Boudoin* case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, *so it does not become unseaworthy by*

reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service." (Emphasis supplied)

In a case involving a longshoreman illness arising out of an unusual amount of carbon disulfide in the grain being loaded aboard the ship the District Court of Maryland in *McMahan v. The Panamolga,* 127 F.Supp. 659 at page 670, referred with approval to the *Cookingham* and *Daniels* cases, *supra,* and stated:

> "In my opinion the warranty of seaworthiness does not go so far as to make the shipowner liable to libelants in this case for any injury which they may have sustained by reason of the presence of an unusual amount of carbon disulfide in the grain being loaded on board the ship. Any claim which libelants may have arising out of this condition must be based upon the alleged negligence of the shipowner or its agents."

It is to be noted in the above case that the conclusions of law were under the two headings of "seaworthiness" and "negligence" and that the above-quoted portion was contained under the "seaworthiness" heading.

In connection with the foregoing cases illustrating the application of the doctrine of transitory unseaworthiness or unsafe conditions as set forth in the *Cookingham* case, *supra,* the court is respectfully reminded of the testimony in the record indicating that the necessary cleanup work in the hold was done at Tacoma prior to the vessel's travel to Seattle; that this particular hold was completely closed or battened down at the time of the vessel's arrival at Seattle; and that the appellee Maloney was the first man down into the hold.

This uncontradicted testimony clearly failed to establish that the officers or the crew of the vessel observed the tween deck area in question or had an opportunity to observe the same as to whether or not it was covered with wheat kernels or wheat dust. In the absence of proof that the officers observed or had an opportunity to observe this condition, the vessel did not have a sufficient amount of notice either actual or constructive. Thus the basic element necessary for the application of the *Cookingham* doctrine, namely lack of notice, is present and the said doctrine is therefore properly and necessarily applicable. Accordingly, the doctrine should have been applied by the lower court and the complaint dismissed.

B. The Damages Awarded by the Trial Court Were Clearly Excessive

As its second assignment of error the appellant contends that the trial court committed error in that the damages awarded were excessive; that the quantum thereof was such as to shock the conscience and that the complete lack of any credible evidence in the case to support the amount of the judgment indicates without possibility of dispute that a gross injustice has been suffered by the appellant. This is clearly established by the testimony of the medical witnesses including the evidence most favorable to the appellee together with the record of the work activities of the appellee following the injury.

The appellee testified that he continued working during the balance of the stevedore operations on the GOLDEN GATE and that he was then sent by his employer

to a Dr. Smith who diagnosed a sprain and recommended physiotherapy treatments. This doctor indicated that there was no reason why Maloney could not continue working (Tr. 82). The appellee received several physiotherapy treatments between June 28 and December 28, 1953, following which he reported to Dr. Bernard Gray on December 28, 1953 (Tr. 66). As of that date he reported to Dr. Gray that he had had no time loss (Tr. 67). It is to be noted that the original findings of Dr. Gray on this date of examination were meager. The doctor found only a small limitation of motion (Tr. 67), "some" swelling at the top of the wrist and advised the patient to wear a leather cuff (Tr. 68). The x-rays which were taken by Dr. Gray revealed nothing significant (Tr. 68).

The appellee did not return to Dr. Gray for treatment or further examination until just prior to the trial on August 1, 1955, almost two years later (Tr. 68). His history of work as of that date was that "he had been working since that time" (Tr. 68).

Dr. Gray found the range of motion the same as before, a small lump on the back of the right wrist which was tender, *slight* weakness of grip in the hand which was not marked, and nothing significant in further x-rays (Tr. 69). Dr. Gray felt that the condition of appellee's hand was stationary at the time and estimated the permanent disability at between 15% and 20% of the hand (Tr. 71).

Dr. Morris Dirstine examined the appellee on behalf of the defendant and for purposes of trial on January 11, 1954. At that time there were no objective findings

(Tr. 98). On a subsequent examination on February 3, 1954, the appellee reported much less discomfort in his wrist (Tr. 99). Again on February 15, 1954, the appellee reported no discomfort in his wrist (Tr. 100) and again on February 19, the doctor found no evidence of swelling or of a ganglion or tumor.

On August 17, 1954, the appellee again reported to Dr. Dirstine and stated that he had been able to carry on his occupation but with *some* discomfort (Tr. 101). At that time there was no evidence of a tumor formation and the appellee had complete range of all motions of his wrist (Tr. 101). On his last examination of September 30, 1954, Dr. Dirstine again found no objective findings or disability, swelling, or tumor formation but found good range of wrist motion without inflammatory reaction. The patient at that time presented a normal hand and wrist (Tr. 102). With reference to the qualifications of the two doctors who testified at the trial it is material to note that while Dr. Gray was a specialist in general orthopedic and traumatic surgery (Tr. 65), Dr. Dirstine had limited himself to surgery of the hand for a period of ten years (Tr. 96) and that he had treated or observed several hundred ganglion cysts of the wrist in his professional experience (Tr. 115).

Even if this Court disregard completely the testimony of the doctor produced by the appellant and rely solely on the testimony of the appellee's medical witnesses, it is obvious that the monetary value placed upon the appellee's injury is completely unsupported by the evidence.

The earnings of the appellee as contained in his own testimony for a period preceding the accident and following the same may be tabulated as follows:

1952	$2383.32
1953	4663.28
1954	2988.32 (Tr. 85)
1955 (to date of trial)	2750.00 (Tr. 86)

During the year 1954 an ankle injury kept the appellee from work from September 18, 1954, to December 6, 1954 (Tr. 85).

From the above earnings we have calculated the average monthly rate for these years as follows:

1952	$198.61
1953	388.60
1954	324.88
1955 (to date of trial)	400.00

The above figures together with appellant's exhibit A-1 indicate the normal fluctuating earnings of workmen of this type. Of particular significance is the very high rate of monthly earnings made by appellee during the immediate past seven months prior to the trial which averages higher than any of the three previous years.

In an attempt to portray vividly the excessiveness of the damages which have been awarded to appellee herein it is of some value to note what both juries and courts have done in other jurisdictions for similar or greater injuries.

One of the most exhaustive of recent works on the question of damages is to be found at 16 A.L.R.(2d) 3 wherein 390 pages of text are devoted to a study of cases

from 1941 to 1950 covering all portions of the human body. The subdivision on the wrist including fractures, dislocations, sprains and other injuries is to be found at page 385. Of 18 cases tried to a jury for wrist *fractures* wherein the amounts were held not to be excessive, only two cases reported verdicts in excess of the amount awarded appellee herein. Of these 18 cases 13 reported verdicts of $10,000.00 or less.

Of the six *fracture* cases reported wherein damages were fixed by the court, none of the reported cases exceeded the verdict awarded appellee herein. Seven *fracture* cases were listed with verdicts held to be excessive and none of these verdicts as reduced by remittitur exceeded $15,000.00.

Under the section on dislocation or sprains of the wrist, five cases were reported as being not excessive ranging from $400.00 to $15,000.00. Of those wherein damages were fixed by the court, two cases were reported, neither exceeding $3,000.00. Of those held to be excessive two were reported and they did not exceed $8,000.00 as reduced.

Under the caption "Wrist—Other Injuries" of those held not excessive 15 cases were reported with only two exceeding $12,000.00. In this category of those tried by the court six were reported with only one exceeding $14,000.00. Of those held to be excessive seven were reported with only one exceeding $20,000.00.

The appellant realizes the difficulty in comparing various injury cases and the results thereof but it appears from the foregoing extensive annotation that for a ganglion cyst, and for a 15% limitation of motion of

the wrist together with accompanying weakness, as testified to by the appellee's medical expert, the appellee has been awarded an amount far in excess of the amounts contained in the reported cases in the annotation referred to even where those cases involve *serious injuries involving single or multiple fracture.*

CONCLUSION

Appellant respectfully submits that the trial court failed to apply the proper rules of law to the facts of the case since the appellee's accident and the circumstances surrounding it clearly fall within the ambit of operation of the doctrine of transitory unseaworthiness.

Appellant also respectfully submits that a careful review of the medical evidence most favorable to the appellee does not in any way support the amount of the judgment rendered and that the disparity between the medical evidence and the judgment is such as to shock the conscience of one administering justice.

Respectfully submitted,

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